# Embracing the Tension between National and International Human Rights Law: The Case for Discordant Parity

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> "Sovereignty [is] 'freedom that is organised by international law and committed to it.'"[1]

> "[T]he legal consciousness of the civilized world demands the recognition forthe individual of rights that are immune from any interference on the part of the State.[2]

**Abstract**

*Individual rights are secured by at least two legal sources: constitutional law and international law. The co-existence of constitutional and international law norms is inevitably a source of conflict: When there is a conflict between a constitutional provision and an international law provision, which (if any) provision should have the upper hand?*

*Theorists thus far have argued for (and assumed the necessity of) a clear hierarchy between constitutional and international law. This Article argues that the conviction that one system of norms is superior to the other is false. Instead, we embrace competition between constitutional and international norms, what we call the "discordant parity hypothesis." It is the persistent tension and conflict between the two systems of norms that is necessary for recognizing and ensuring individual freedom.*

*To establish the discordant parity hypothesis, we explore the best possible arguments for both the internationalists' and for constitutionalists' positions. We suggest that the argument supporting the overriding power of international law norms is based on the importance of the implied resulting recognition that the*

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[1] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 2 BvE 2/08 (¶ 223) (Ger.) (the Lisbon Treaty judgment) (quoting Ferdinand von Martitz, a German legal scholar writing in 1888, *see infra*, note 9).

[2] *Institut de droit international, Déclaration des droits internationaux de l'homme* [Declaration on the International Rights of Man] (Rapporteur: M. André Mandelstam) (Session de New York – 1929), *available at* http://www.idi-iil.org/idiF/resolutionsF/1929_nyork_03_fr.pdf.

*state has a publicly recognized duty to protect rights. The overriding power of constitutional norms stems from its promise to individuals of being the masters of their own destiny. We further argue that this is necessary for the effective exercise of rights. Both claims are compelling . Instead of trying to establish hierarchy between the claims, we embrace their equal standing and the ensuing conflict between them. We believe that constant tensions and conflicts between international norms and state norms are ideally suited to ensure individual liberty.*

## *I. INTRODUCTION*

Individual rights are secured by at least two different legal sources: constitutional law and international law. The co-existence of constitutional and international law norms is inevitably a source of conflict: When there is a conflict between the scope of a right under a constitutional provision and an international law provision, which (if any) provision should have the upper hand? Who is (or should be) the final arbiter as to what rights we have?

This Article argues that the conviction that one system of norms is superior to the other is false. As a matter of fact, we argue in favor of "discordant parity hypothesis" that embraces competition between constitutional and international norms. It is the persistent tension and conflict between the two systems of norms, each of which claims superiority, that is necessary for recognizing and ensuring individual freedom.

> Debates about the relations between constitutional and international law hark back to the emergence of the concept of the sovereign state. The rejection of a global order based on religion or nature and the rise of popular sovereignty necessarily gave rise to two conflicting theses. One gave primacy to the national constitution, which draws its authority from the people who is the only legitimate source of power, being the *pouvoir constituant.*[3] This implied two consequences for the relationship between constitutional law and international law: International law is derived from the constitution, founded on state consent,[4] and it stops at the states'

[3] EMMANUEL JOSEPH SIEYES, QU'EST-CE LE TIERS ETAT? (Paris, 1789) ("The nation exists prior to everything; it is the origin of everything. Its will is always legal. It is the law itself. Prior to the nation and above the nation there is only natural law…. Not only is a nation not subject to a constitution, it cannot be and should not be." See EMMANUEL J. SIEYÈS, POLITICAL WRITINGS 93, 136-37 (Michael Sonenscher ed. & trans., 2003)).

[4] S.S. Wimbledon (U.K., Fr., It., & Japan v. Ger.), 1923 P.C.I.J. (ser. A) No. 1 at 25 (Aug. 17). ("The Court declines to see in the conclusion of any Treaty by which a state undertakes to perform or to refrain from performing a particular act an abandonment of its sovereignty … [T]he right of entering into international engagements is an attribute of state sovereignty"); S.S. Lotus (Fr. v.

> borders, incapable of intervening in states' internal affairs.[5] Hence it was maintained that: "The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. "[6]

But there is also an alternative reading of the relationship between the constitutional and the international that put international law as the fountainhead of the law. August Wilhelm Heffter wrote about a European society of states that was bound by a shared legal order,[7] Georg Jellinek argued that as a member in the "community of states," all states were necessarily bound by "objective international law,"[8] and Ferdinand von Martitz proposed that sovereignty was "freedom that is organized by international law and committed to it."[9] Hans Kelsen was the first to offer a systemic elaboration of the relationship reaching through his pure theory of law the conclusion that constitutional law is necessarily derived from the international legal order.[10] Hersch Lauterpacht grounded the primacy of international law on its reflection of "the universal law of humanity in which the individual human being, as the ultimate unit of all law, rises sovereign over the limited province of the State."[11]

This way or the other, the preoccupation of theorists has been to argue for (and often to assume the necessity of) a clear hierarchy between constitutional and international law. This resulted in endless debates whether "dualism" (the idea that state law was the source of international law) could or should concede to a "monist" vision of the legal system (i.e., that international law was the source of state law).[12] The question was not *whether* one set of norms overrides the other

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Turk.) 1927 P.C.I.J. (ser. A) No. 10 at I8 (Sep. 7) (International law "emanate[s] from the [states'] own free will").

[5] Dieter Grimm, *The Achievement of Constitutionalism and its Prospects in a Changed World*, *in*THE TWILIGHT OF CONSTITUTIONALISM? 3, 13 (Petra Dobner and Martin Loughlin eds.,2010) ("The two bodies of law - constitutional law as internal law and international law as external law - could thus exist independently of one another.").

[6] 11 U.S. 7 Cranch 116 136 (1812).

[7] As translated by HENRY WHEATON, ELEMENTS OF INTERNATIONAL Law Pt. I § 11 (Richard Henry Dana Ed., 8thed, 1866) ("A Nation associating itself with the general society of nations, thereby recognizes a law common to all nations by which its international relations are to be regulated.").

[8] Georg Jellinek, Die Lehre von den Staatenverbindungen 92-96 (1882), as lucidly explained in Jochen von Bernstorf, *Georg Jellinek and the Origins of Liberal Constitutionalism in International Law*, 4 GOETTINGEN JOURNAL OF INTERNATIONAL LAW 659, 672-3 (2012).

[9] 1 FERDINAND VON MARTITZ, INTERNATIONALE RECHTSHILFE IN STRAFSACHEN 416 (1888).

[10] HANS KELSEN, REINE RECHTSLEHRE (1st ed. 1934), *translated in* HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY (Bonnie Litschewski Paulson & Stanley L. Paulson, 1992). In his second edition he revised his argument, suggesting that hierarchy between the two systems must exist, but his pure theory cannot resolve which system is superior to the other: HANS KELSEN, PURE THEORY OF LAW (Max Knight, trans., 1960).

[11] Hersch Lauterpacht, 'The Grotian Tradition in International Law', 23 British Yearbook of International Law 1, 47 (1946). *See* Roman Kwiecień, *Sir Hersch Lauterpacht's Idea of State Sovereignty – Is It Still Alive?* 13 INTERNATIONAL COMMUNITY LAW REVIEW 23 (2011).

[12] Hans Kelsen, Introduction, *supra* note 11, at 107–55; GEORGES SCELLE, PRÉCIS DE DROIT DES GENS: PRINCIPES ET SYSTEMATIQUE (Dalloz 2008)(1932); Armin von Bogdandy, *Common principles for a plurality of orders: A study on public authority in the European legal area*, 12 INT'L J. CONST. L. 980 (2014).

but merely *which* set of norms overrides the other: either constitutional law norms override international law norms or vice versa.

Traditionally both internationalists and constitutionalists engaged in this debate use two types of arguments: 1) an instrumental argument under which one system of norms overrides the other because it is more likely to protect rights: it is more effective, stable, impartial, or superior in other respects. [13] 2) A consent-based argument under which the normative status of the norms rests on (individual or state) consent.[14] Both the instrumentalist argument and the consent-based argument have been subjected to harsh critiques.[15]This Article develops a new type of arguments for internationalism and for constitutionalism. It also challenges the quest for a hierarchy between constitutional law and international law. We believe that the quest for a hierarchy is inherently misguided. Instead, we argue for "the discordant parity" hypothesis, namely the equal status of international law and constitutional law.

To establish the discordant parity hypothesis, the Article provides new arguments both for the internationalists' convictions under which international norms ought to override constitutional norms (the "internationalist" view) and for constitutionalists' convictions under which constitutional norms ought to override international norms (the "constitutionalist" view). Ultimately, we suggest that the

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[13] For internationalists who stress the instrumentalist arguments, see Louis Henkin, *International Human Rights as "Rights"*, 1 CARDOZO L. REV. 425, 427–28 (1979); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373, 1383 (2005) ("The human rights regime was principally constructed to identify and classify which rights are globally legitimate, to provide a forum for the exchange of information regarding violations, and to convince governments and violators that laws protecting human rights are appropriate constraints on the nation-state that should be respected."). For constitutionalists who stress instrumentalist arguments, see Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 415 (1984).Eric Posner, *International Law: A Welfare Approach* 73 U. CHICAGO L. REV. 487, 543 (2006). *See* in general, ERIC POSNER, THE PERILS OF GLOBAL LEGALISM (2009), Eric Posner, THE TWILIGHT OF HUMAN RIGHTS LAW (2014).

[14] For internationalists who use consent-based arguments, see S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 68 (Sept. 7); Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 5 (1999). For constitutionalists who stress consent-based arguments, see THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961) ("The federal and State governments are in fact but different agents and trustees of the people"); Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1 (2000).

[15] For a general critique of instrumentalist arguments in political theory, see Alon Harel, Why Law Matters 1-9 (2014). Under the argument developed there instrumentalist arguments typically suffer from "insincerity" or "inauthenticity;" they fail to identify (or capture) the real sentiments underlying the urge to sustain or design global institutions or procedures or state constitutions. There is a sense that instrumental considerations are not the ones that appeal to citizens or politicians and that, as a matter of fact, such considerations are mere rationalizations of other sentiments. For a critique of consent-based argument, see Mila Versteeg, *Unpopular Constitutionalism*, 89 IND. L.J. 1133, 1138 (2014). Internationalist consent-based arguments do not seem to cohere with the dominant view in international law under which international human rights are ultimately natural rights. As asserted in the Preamble to the International Covenant on Civil and Political Rights (1996): [T]hese rights derive from the inherent dignity of the human person." For more general philosophical objections to consent-based arguments, see Ronald Dworkin, *The Original Position*, *in* READING RAWLS 16, 17–21 (Norman Daniels ed., 1975); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1807-08 (2005).

parity hypothesis is ideally suited to ensure individual liberty. The parity between international and constitutional norms does not rest on harmonious interdependence. Parity implies friction; but friction is a positive, indeed, a necessary element for ensuring individual liberty. Hence the '*discordant* parity': international norms and constitutional norms compete with each other and seek to dominate the normative sphere.

Our justification for the discordant parity model does not rest on empirical conjectures concerning the effectiveness of such a system. Instead, our argument rests on principled concerns – concerns that are independent of any empirical conjectures. The justifications for both internationalism and constitutionalism defended in this Article give rise to what we label *robust internationalism* and *robust constitutionalism*. We label it 'robust' because under the proposed view, the value of international law norms and the value of constitutional law norms do not hinge (merely) on their contingent contribution to the substantive merit of the resulting political or legal decisions. In contrast to the prevalent view, international law norms as well as constitutional law norms are not mere contingent instruments to guarantee good, just or coherent decisions; they are valuable for other reasons and, consequently, their desirability does not depend only or primarily on the degree to which they contribute to the substantive merit of the resulting legislation or decisions. More specifically international law norms and constitutional law norms are valuable because they transform and restructure the relations between the state, its citizens and the global community in various ways. The conflict between the two positions is inevitable as it is a byproduct of justified claims of both systems.

To justify the superior normative status of international norms (*robust internationalism*) we argue that the overriding power of international norms is necessary to publicly acknowledge that the protection of rights by the state is obligatory. The protection of rights is a *duty* of the state – including its *pouvoir constituant* – rather than contingent on its good will or discretion. The overriding power of international law norms provides public recognition that the protection of rights is the state's (and the people's) *duty* rather than merely a discretionary gesture on its part.

To justify the superior normative status of constitutional norms (*robust constitutionalism)* we argue that the overriding power of state constitutions is necessary to guarantee that citizens are not alienated from their rights. The value of rights hinges on the active participation of the citizen in the definition and the exercise of her rights. The effective exercise of rights hinges on the control that individuals have over the content of the rights without which rights lose their value.[16] To the extent that individuals do not perceive the rights as their own creation, their ability to pursue these rights and exercise them is undermined. We support therefore the discordant parity paradigm under which the each of the two systems of norms claims to be superior to the other.

[16] HAREL, supra note 16 at 39.

To help conceptualize the discordant parity paradigm let us provide an analogy. The legal system typically enforces obligations on parents to take care of their children and promote their well-being according to authoritative determinations and it treats these determinations as overriding the determinations of the parents. The legal obligation is important not only or primarily for its contribution to the welfare of children. Instead, it is important also because it underscores the fact that promoting the well-being of children is not discretionary on the will of parents; it is a duty publicly recognized by the law.[17] Yet, at the same time, it is also understood that parents must promote their children's well-being because they care about it rather than because they merely comply with a legal obligation. Hence, the law must also respect the rights of parents to actively participate in making authoritative determinations concerning the well-being of the child. Inevitably, there may be tensions between the state's determinations and the parents' determinations of what well-being consists of and the best means to bring it about. Authoritative judgments of the state claim priority over the judgments of the parent and, at the same time, some parents defy the state's judgments on the grounds that their judgment is superior to that of the state and therefore it ought to prevail. Such defiance is sometimes tolerated by the state given the understanding that parents have the right to actively participate in making determinations concerning the well-being of their children.[18] There is therefore a persistent tension between the conviction that well-being of children must be defined by the state in ways that are independent of the parent's discretion and the conviction that effective parenthood presupposes power to make such determinations and, at times, even subordinate the state's determinations to those of the parent.[19] This tension is not only tolerated, but should be protected, to emphasize the soundness of both perspectives. The relations between international law norms and constitutional law norms are similar; international and constitutional norms co-

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[17] Michael S. Wald, *State Intervention on Behalf of Neglected Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 638 (1976).

[18] Education can provide a good example. Parents may wish to educate the child in a way that the state regards as detrimental to the well-being of the child. On the one hand, parents must have some input on the child's education; on the other hand the state ought to impose some limits. We don't know ex ante what the boundaries of state intervention are. At times, we respect the parent's judgments even when we judge their judgments to be wrong. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

[19] A clear articulation of this ambivalence concerning the law can be found in Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 Yale L. J. 293, 301 (1988). Bartlett argues:

> "The role of law in forming the social context within which parents might internalize high ideals for responsibility and voluntarily proceed to act upon them is a tricky one. Somehow the law must contribute to the creation of high expectations for parents, while leaving sufficient leeway so that parents are free to become responsible in the true sense. A hands-off approach by the law to questions of parenthood would abdicate any societal responsibility for norms of parenthood; yet a tight, comprehensive set of controls would remove from parents the discretion to act, upon which the capacity of moral decision making actually depends."

exist and their co-existence is characterized – and must be characterized – by persistent conflicts and tensions.

Part II defends robust internationalism and Part III defends robust constitutionalism. Part IV defends the discordant parity model and draws the implications of this view. Part V concludes.

## II. *WHY INTERNATIONAL LAW NORMS MUST ENJOY PRIMACY? IN DEFENSE OF ROBUST INTERNATIONALISM*

The Talmud tells a story of a Gentile who missed a great business opportunity because he did not want to disturb his father by taking a key that was under his father's pillow. The red cow that was his reward for honoring his parents was of immense value at the time. Rabbi Ulla inferred from this story the lesson that if a Gentile, who is not commanded by God to honor his parents, was rewarded so profoundly, a Jew, who is subject to the commandment to honor his parents, would be rewarded even more for so doing. Rabbi Ulla based this conclusion on a statement by Rabbi Hanina that "he who is commanded and fulfills [the command] is greater than he who fulfills it though not commanded."[20]

This Part applies this lesson to the state, and argues that a state which honors rights but is not "commanded to do so," i.e., is not internationally bound to do so, is inferior to a state in which the constituent assembly "is commanded to do so," i.e., bound by global duties protecting individual rights (and complies with them). The latter society is superior for the reason that in such a society individuals do not live "at the mercy" of the collective; their rights do not depend on the state's judgments (concerning the public good) or on its inclinations.

### A. Why States Should be Bound by Internationally Recognized Human Rights

This Part develops the observation illustrated by the red cow story; it argues that the value of internationally-based human rights is not grounded merely in their effectiveness or instrumental value. Instead, they serve an important function in publicly conveying the fact that human rights are not discretionary; that they are a matter of global concern to be observed by the state *as a matter of duty* rather than choice, preference or judgment. This is the real case for robust internationalism. It is robust in the sense that this justification does not hinge on empirical considerations such as the effectiveness of international human rights or the question of whether the states agreed to be bound by these rights.

[20] *See* BABYLONIAN TALMUD, tract Kiddushin at 31a.

Individuals have political rights and the normative force of these rights is (at least sometimes) independent of the global order. The state has a duty to protect freedoms and guarantee equality independently of whether these are globally entrenched. One can envision two ways to protect these rights. Under the first, the protection of rights is done exclusively by the state. Under the second, there is an international order of norms which entrenches these rights. Theoretically, at least it is possible that the protection of rights under both systems will be equally effective. The question we address here is which system is better? Is it valuable to internationally entrench pre-existing moral or political rights even when such an entrenchment is not conducive to the protection of rights? Do international rights *as such* matter, and if so, why?

This Part addresses that question and maintains that rights grounded in international law matter, as the international entrenchment of pre-existing moral/political rights is valuable (independently of whether such a recognition is conducive to the protection of these rights). The value of international entrenchment is grounded in the fact that such an entrenchment is itself a form of public recognition that the protection of rights is the state's duty rather than merely a discretionary gesture on its part, or that it is contingent upon the state's own judgments concerning the public good. The international entrenchment of rights is essential to the protection of freedom. Citizens are freer in a society in which rights are recognized as duties rather than as grounded in the mere judgments or inclinations of the founders of the constitution or its interpreters.

To justify internationalism examine the difference between a world in which the state constitution protects rights but given the absence of any internationally recognized rights there are no publicly recognized limitations on the power of the state. The decision to protect rights and entrench them in the constitution does not depend upon the state's internationally recognized duties; instead, it is understood to be contingent upon the constitution or the inclinations of the founders or interpreters of the constitution. The citizens of such a state are 'at the mercy' of the inclinations of the founders or interpreters of the constitution. In contrast, if the state is bound by international norms the state is publicly bound by such norms and consequently citizens' right do not depend upon such inclinations.

The rationale underlying internationalism is grounded in the significance of the public recognition of rights-based duties binding the state. In particular, the rationale is grounded in the publicly salient differentiation between discretionary decisions of the state (namely those decisions that are grounded in the state's inclinations/preferences/judgments/tastes) and those decisions that are grounded in international rights-based duties. While in both cases fundamental freedoms are protected to the same extent, it is only in the latter case that they are honored, i.e., protected *as rights* which bind the state rather than as discretionary measures the protection of which is at the mercy of the state.

The claim we defend has two distinctive components. The first concerns cases in which the state complies with the internationally-recognized rights. It is obviously good when our rights are being protected by the state, but it is even better if it is acknowledged that the protection is not a byproduct of discretion or judgment on

the part of the state. The international norms highlight the fact that the protection of rights is not discretionary; it is mandatory and a state which protects them does not do it because it wishes to do so; it merely complies with what it ought to do.

The second component concerns cases of violation of rights. It is of course bad if our rights are being violated by the state, but it is even worse if the state violates them without the violation being labelled as a violation and condemned as wrongful. The international community serves as a body that recognizes the wrongfulness of the violation and, consequently, raises its voice and pronounces condemnation. Such a voice may of course serve to deter (or prevent) future violations or help to bring about a remedy. But this is not the only purpose of global proclamations. In addition, global proclamations constitute public acknowledgment and recognition that the state committed a wrong,

To sum up we defend here two observations: 1) It is good when rights are respected but it is even better when rights are respected not merely out of the good will or the judgment of the state but out of public understanding that it is its duty to respect these rights; 2) It is bad when rights are violated but even worse when the violation is not publicly recognized as such. Some skeptical voices may question the normative relevance of this observation. In particular, one may ask why one should care about such differentiation between issues that are subject to the discretion of the state and those that are not. Arguably, what we care about is the effective protection of rights and not whether such a protection is recognized as a duty or who recognizes it as a duty. Hence, international human rights are mere instruments and the view that attributes to them value independently of their effects on the compliance of the states is nothing but internationalist fetishism.

The answer to this challenge rests on the concern for freedom, in particular the concern for republican freedom. Republican freedom requires not only that other people do not restrict our freedoms but also that no other people *have the power* to restrict our freedoms.[21] Consequently, citizens are freer in a society in which human rights are recognized as duties binding the state rather than as resulting from the mere judgments, preferences or inclinations of legislatures or polities. In states in which human rights are recognized as duties imposed on the state, citizens do not live at the mercy of their legislature or, at the mercy of the drafters or interpreters of the national constitution. Their rights are not contingent on the good will or the inclination of the state; they are protected by the state because of the institutionally-entrenched international recognition that it is obliged to protect them and not merely because the state prefers to protect them or because it judges that protecting them promotes the public good.

To establish this claim consider first the following analogy: A needs $100 to cover some urgent costs. Fortunately, B owes A $100 and A turns to B to get his money back. B denies that he *owes* A the money, but, as a gesture of friendship, is willing to grant A $100 “as a present,” as B professes to understand that A faces economic hardship.

[21] PHILLIP PETTIT, REBULICANISM: A THEORY OF FREEDOM AND GOVERNMENT 5 (1999).

A is justifiably resentful and possibly even furious. A cares not merely that the $100 be given to him to cover his urgent costs, but also that it be given to him as a repayment of a debt rather than as a present. A wants B to *repay his debt*, rather than merely to receive money. But why should A care? Why should it matter to him whether B gives him a present or repays his debt? B's reluctance to concede his debt harms A, as it implies that A is "at the mercy of" B's good will, i.e., that it is up to B to decide whether or not to give A the money.

Even if B insists on giving the money as a present, A may find some consolation in the willingness of the community to support his demand, impose sanctions on B and punish B for his reluctance to acknowledge his debt. Thus, A may not merely justifiably insist that B concede the debt but also insists that if B fails to repay his debt to A (and insists on giving A "a present"), then the community at large, reproaches B. As long as such a public condemnation is as a general rule intense and effective, then it would be appropriate to say that A is not "at the mercy of B."

Closer to our concerns here is the example of slavery. Slavery could presumably be eradicated without entrenching an international prohibition on slavery. Instead of entrenching such an international prohibition, citizens could entrench such prohibitions in their own constitutions. Yet, the international prohibition serves to highlight the fact that the abolition of slavery is not discretionary on the will of the state; it does not depend on its good will. The entrenchment of international law prohibition on slavery may have had some instrumental value in eliminating slavery. But the instrumental contribution to the elimination of slavery is not the only concern underlying the international entrenchment of the prohibition against slavery.

There are two important claims that are illustrated by considering the example of debt. First, in order not to be "at the mercy of" B it is not sufficient that there are *moral* norms requiring B to honor rights. There also must be effective *social* norms, practices, conventions and understandings requiring B to do so. It is the public understanding that counts not merely the binding force of moral norms. In the absence of such a public understanding, it can be plausibly said that the debt is "up to B" in the sense that the repayment of the debt hinges on B's judgments or inclinations to repay. In our case the social norms that can bind the state are international norms; they are the ones that claim priority over the state constitution and thereby underscore the fact that the protection of rights is not a discretionary measure on the part of the state and does not rest upon its judgments.

Second, in order "not to be at the mercy of B" it is not required that B would indeed be forced to acknowledge his debt. Precisely as I am not "at the mercy" of criminals if I live in a state that effectively enforces the law (even in case a crime is committed against me), so A is not at the mercy of B simply because B refuses to acknowledge his debt so long as there is a general system of sanctions or at least stigma attached to people who refuse to acknowledge their debts. A failure of the system to enforce the debt of B in a particular case does not imply that it is "up to B" to pay or not to pay his debt or that A is "at his mercy." Further, for

certain purposes, even if I am very vulnerable to outside interference, there is a fundamental difference between different types of vulnerability. As Louis Phillipe Hodgson noted: "If I live in a particularly nasty part of town, then it may turn out that, when all relevant factors are taken into account, I am just as vulnerable to outside interference as are the slaves in the royal palace, yet it does not follow that our conditions are equivalent from the point of view of freedom."[22]

International norms that require the state to honor its rights-based duties are equivalent to the social norms that require B to pay his debt or to the legal norms that bar slavery. Such norms serve the purpose of publicly labelling violations of human rights as wrongs. In the absence of international norms, individuals live at the mercy of the provisions of their own national constitutions. If the state violates individual rights, no authoritative body superior to the state can proclaim that wrongs were committed. While other states can condemn the violations, they cannot claim that their judgments are superior to those of the state. If rights are honored, it is unclear whether honoring them is merely discretionary or obligatory on the part of the state.

Anecdotal indications for the conviction that internationalism does not rest merely on its effectiveness can be found in some of the statements made by the founders of the global order. One of the first architects of the international protection of human rights, André Mandelstam, who drafted the 1929 Resolution of the Institute of International Law on international human rights, was the first to articulate this idea. He stated:

> "I am convinced that, without resorting to the political arena, the Institute's duty is to raise its voice loudly and to proclaim without delay the great new principle […]: human rights exist, and it is the duty of each state to respect them."[23]

It is therefore the *loud voice* and the *proclamation without delay* that seem important to Mandelstam. The global voice is a voice that announces that "it is the duty of each state" to respect human rights. This conviction is reflected in the 1929 Resolution that emphasizes several times the "duty" of every state to recognize and protect the equal right of every individual to life and liberty, as well as other rights.[24]

The significance of proclamation of this type was also emphasized by Eleanor Roosevelt, the mastermind of the 1948 Universal Declaration of Human Rights who stressed the importance of the declarative act of an otherwise non-legally binding document:

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[22] Louis-Philippe Hodgson, *Kant on the Right to Freedom: A Defense*, 120 ETHICS 791, 816 (2010).

[23] André Mandelstam, Inst. of Int'l Law (Oct. 8, 1921), *quoted in* BRUNO CABANES, THE GREAT WAR AND THE ORIGINS OF HUMANITARIANISM, 1918–1924, at 313 (2014); *See also* Helmut Philipp Aust, *From Diplomat to Academic Activist: André Mandelstam and the History of Human Rights*, 25 EUR. J. INT'L L.1105 (2014).

[24] *See, e.g, supra* note 2, Art. 1.: "Il est du devoir de tout Etat de reconnaître à tout individu le droit égal à la vie, à la liberté, … " ("**It is the duty** of every State to recognize to everyone the equal right to life, liberty…" (our emphasis).

> It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations. ....[25]

These sources suggest that internationalism is designed to underscore the fact that the protection of human rights is a matter of duty rather than discretion or good will. The international order consisting of binding global directives facilitates a clear differentiation between duty-based decisions and discretionary decisions which depend on the good will of the state. Internationalism highlights the fact that the former category of duty-based decisions must be publicly acknowledged and differentiated from the second. Let us turn to examine some objections to this analysis.

## B. At the Mercy of Persons after All? Response to Criticism

Against this argument one could raise the following objection: neither international norms nor constitutional norms can protect our freedom as all of these norms are a human creation and, consequently, we all are subject to the mercy of others. Somebody after all has to draft international norms and somebody has to interpret them. It follows that even if binding international norms are entrenched citizens still live at the mercy of the drafters of the global norms or their interpreters. In the absence of a constitution, citizens in a democracy live at the mercy of their legislatures. The entrenchment of constitutional rights that overrides legislative decisions protects them from this predicament but, instead, it subjects citizens to the mercy of the drafters (or interpreters) of the constitution. Similarly, international human rights norms may protect individuals from the whims of the interpreters or the drafters of the constitution but it subjects individuals to the preferences, judgments and whims of those who draft or interpret the international norms. There is therefore no way we can overcome the subjugation to some set of norms that ultimately are drafted and interpreted by human beings and depend therefore on their discretion or on their preferences.

It is easy to see that this argument implies that freedom in the sense that we use here can never be realized. Whatever constraints designed to protect individual rights are imposed, it is always the case that there is some entity which imposed it (or which can amend or interpret it).

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[25] Eleanor Roosevelt, U.S. Delegate, U.N. Gen. Assembly, On the Adoption of the Universal Declaration of Human Rights (Dec. 9, 1948). Interestingly the approach taken by the drafters of the 1948 Declaration is radically different. Instead of emphasizing states' duties, as the 1929 resolution did, the Universal Declaration refers to "the rights" of "everyone," The rationale provided to these rights is consent. ("whereas Member States have pledged themselves to achieve, … the promotion of universal respect for and observance of human rights and fundamental freedoms.").

This challenge is important and misguided at the same time.[26] It is important because (as we show below) it can serve in explaining the limitations of national constitutions or even of international norms. It is true therefore that in some sense we are always at the mercy of some entity or other. At the same time, it is misguided because it proves too much. It is one thing to be a slave whose benevolent master does not use his power to issue commands and quite another thing to live in a jurisdiction which prohibits slavery, or in a jurisdiction which entrenches a constitutional prohibition against slavery. Admittedly, in all cases we are subject to the power of some entity (the master in the first case the legislature in the second case and the founders of the constitution in the last case). But, it is essential to know who that entity is, what it represents and what it means to be subjected to its powers. The slave owner may be benevolent and never use his powers but to be at his mercy is demeaning nevertheless. In contrast, to be subject to the power of the interpreter of the international or the constitutional norm is fundamentally different and it does not bear on our status in the same way.

This observation raises the question of identifying the difference between these two conditions. When can we justifiably raise the grievance that we are un-free not because our rights are violated but because our rights hinge on the good will or intentions of others and when being dependent on the will of others is detrimental to our freedom.

Judgments of this type are contextual; they require an understanding of traditions practices and institutions. To be at the mercy of an interpreter of the international or the constitutional norm is often perceived to be better than to be at the mercy of a legislature. This is not (only) because courts are more likely to protect such rights than legislatures. More importantly, the interpreter has a text to interpret, and any interpretation requires her to give account for her choice, whereas the voter has only to cast her preference, unabashedly promoting her interest. The same relation which exists between legislatures and state constitutions is replicated in the relations between the international community and the constitutions.

We can sum up the discussion by using perhaps an observation which has been made in a different context by Thomas Nagel: "To be tortured would be terrible; but to be tortured and also to be someone it was not wrong to torture would be even worse."[27] Robust internationalism rests on the conviction that there is one thing that is even worse than violation of rights – violation which is not accompanied by an authoritative proclamation that such a violation is wrong. It is not enough that states protect human rights; in addition, their violation ought to be recognized publicly as a wrong. Human rights internationalism is not merely an instrument to protect rights; the desirability of human rights internationalism does not hinge only on the question of whether it is effective in protecting rights or in minimizing the frequency and severity of human rights violations. The overriding power of international norms provides a clear indication for the binding nature of rights. The protection of rights is not a prerogative of the state which it may

[26] *See* HAREL, *supra* note 16, at 185.
[27] Thomas Nagel, *Personal Rights and Public Space*, 24 PHIL. & PUB. AFF. 83, 93 (1995).

comply with or not. It is a duty of the state and the international norms provide an institutional recognition of this fact.

Naturally, this argument is not conclusive. Perhaps there are strong instrumental reasons which override the concerns raised above. Perhaps, for instance, state constitutions are more effective in protecting rights and the overriding powers of international norms undermine their effectiveness. Indeed, in the next section we show that there are principled reasons to grant overriding normative powers to constitutional norms.

## III. *WHY CONSTITUTIONAL NORMS MUST ENJOY PRIMACY? IN DEFENSE OF ROBUST CONSTITUTIONALISM*

The last Part provided arguments favoring the supremacy of international law. Yet, as we show in this Part there are also compelling arguments favoring the supremacy of constitutional law (or more broadly of state law).

There are two traditional ways to justify the overriding powers of constitutional norms over international norms. Under the first, constitutions are necessary as the protection of rights ought to be informed by local concerns and circumstances. State constitutions may therefore entrench rights in ways that are more conducive to the effective protection of rights given the local concerns and traditions.[28] Under the second, state constitutions are the embodiment of the will of the people and the will of the people or their consent are necessary for legitimacy. Democratic or contractarian concerns therefore require us to subject ourselves to the authority of state constitutions.[29] Hence democratic concerns dictate that state constitutional provisions have overriding powers over global norms.

This Part defends a different justification. It argues that the constitutionalism is necessary for the value of rights to be realized. The constitutional protection of rights is not simply a matter of local concerns, popular consent or general agreement. Instead, the value of rights hinges on who makes authoritative determinations about them. The very same right-protecting norm may have a different value depending on its origins. More specifically, making authoritative judgments by the state induces its citizens to define the boundaries of human rights and their weight. This task in turn is conducive (or even necessary) to the exercise of these rights by citizens. Granting international norms overriding normative status distances citizens from these rights and, consequently, undermines the willingness and readiness to exercise them.

### A. The Value of *Exercising* Rights

[28] *See, e.g.*, James W. Nickel, *Cultural Diversity and Human Rights*, *in* INTERNATIONAL HUMAN RIGHTS: CONTEMPORARY ISSUES 43 (Jack L. Nelson & Vera M. Green eds., 1980); Bonny Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, 22 HUM. RTS. Q. 838, 844 (2000).

[29] For references see supra note 15. See also

Why do rights need to be our creation? What makes it important that we determine what our rights are? The answer lies in an important feature of rights, namely in the fact that (many) rights become valuable when individuals *exercise* their rights. The value of autonomy-enhancing rights remains unfulfilled if individuals do not exercise their autonomy-enhancing rights. This is part of a theme characterizing values more generally. Values, as Joseph Raz maintains, "depend on valuers for their realisation, for the value of objects with value is fulfilled only through being appreciated."[30] Raz continues and argues as follows:

> That the value of objects remains unfulfilled, if not valued, is explained and further supported by a familiar fact. That an object has value can have an impact on how things are in the world only through being recognized. The normal and appropriate way in which the value of things influences matters in the world is by being appreciated—that is respected and engaged with because they are realized to be of value.[31]

Given that rights are grounded in values, the engagement of rights holders is necessary for the realization of the value of rights. Thus, for instance, autonomy makes people' lives better if, and to the extent that, they exercise it in their lives and perceive the exercise of autonomy to be valuable. Yet there are pre-conditions for the successful exercise of rights. The most important precondition is our ability to perceive ourselves as participating in the creation of the rights. Themore the rights are "our creation" the more likely they are to be exercised and appreciated.[32]

Admittedly, this observation cannot be proven either conceptually or empirically. To substantiate it we may compare the situation of a person who gets her rights by decree from a dictator and a person who gets her rights within an active democratic participatory polity which determines the boundaries of these rights. It seems inevitable that the former is more likely to be alienated from her rights while the latter is more likely to endorse the rights and exercise them. Note that unlike the traditional view we do not hold democratic participation to be valuable in itself. Instead, we perceive it as a precondition (or at least as a factor which reinforces) the disposition to exercise rights effectively.

To illustrate let us use the example mentioned in the introduction: determinations concerning the welfare of a child. Identifying what is conducive to the welfare of a child can be done by various agents. But it is particularly desirable that it be done by the parent who is in charge of promoting the welfare of the child. Even flawed judgments made by the parent have value as they contribute to the forging of a strong relationship between the parent and the child. Granting powers to the

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[30] Joseph Raz, *The Practice of Value*, *in* THE TANNER LECTURES ON HUMAN VALUES 124 (2001).
[31] Raz, *The Practice of Value*, supra note 74 at 28.
[32] Robert Post and Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 373, 374 (2007) ("The premise of democratic constitutionalism is that the authority of the Constitution depends on its democratic legitimacy, upon the Constitution's ability to inspire Americans to recognize it as *their* Constitution.") (emphasis in original).

parent to make such determinations (even when her judgments are inferior to those of the state) may therefore be desirable. Similarly we believe granting states overriding powers to make determinations concerning the scope of rights and their weight is valuable not because states are better than the international community in making these determinations but because the very collective participation in making these determinations by citizens is valuable.

Further as Benvenisti and Lustig pointed out in a different context, the participation of citizens in making basic judgments concerning rights "facilitates informed decisions, whose importance to the individual goes way beyond instrumental considerations. Through participation one develops a sense of empathy to one's fellow-citizens and becomes consciously a member of one's community.[33] As John Stuart Mill argued : "[I]t is from political discussion and collective political action that one whose daily occupations concentrate his interests in a small circle round himself, learns to feel for and with his fellow-citizens, and becomes consciously a member of a great community.[34] One of the negative byproducts of internationalism is the resulting alienation of the polity from the culture of rights; in other words, relegating citizens to be norm-takers. Rights must be embodied in the practices of executive bodies, in the modes of operation of state institutions and also be entrenched in foundational documents of the state. This makes rights "ours" in a way that contrasts with the way rights operate in a world in which states "comply" or "defer" to the dictates of international norms.

Constitutionalism or, more generally norms originated in the state (rather than the international community) are (under normal circumstances) the creation of citizens of the state. Irrespective of what the content of the norms is, such a process facilitates the genuine attribution of these norms to the citizens. The citizens can therefore pride themselves as being the creators of these norms. here is a strong intimate relation between us being the creators of the norms that entrench our rights and us being willing and able to exercise these rights. Given that the exercise of rights is what ultimately gives rights value, it follows that constitutionalism is a precondition for realizing the value of rights.

To support this intuition assume a world which is governed exclusively by international law norms. In this world states are bound by international norms protecting human rights. Further in our imaginary world states comply with international norms but they do it merely because of their international duties. They perceive the international norms protecting rights as side constraints imposed on them by the international community.

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[33] Doreen Lustig & Eyal Benvenisti, *The Multinational Corporation as 'The Good Despot': The Democratic Costs of Privatization in Global Settings*, 15 THEORETICAL INQUIRIES IN L. 125, 136 (2014).

[34] JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, 83 (HENRY REGNERY CO. 1962) (1861).

Kelsen had a useful analogy. We can analogize states in a global polity to companies in a state.[35] Companies are expected to abide by the law including the law protecting the rights of workers and consumers. But they are not expected to be active participants in determining what these rights are. They have to accept the authoritative judgments made by the state (and, perhaps, by the international community). One could think of states as companies namely as passive recipients of the judgments of the international community rather than as active participants in determining what rights we have. A state which defers to the international norms and makes no judgments of its own as to the justifiability of these norms is unlikely to create an environment in which citizens exercise their rights. Precisely as a parent who aims at promoting the well-being of a child without participating actively in determining what the well-being of the child consists of would typically fail in doing so, so the state which merely defers to or complies with the international norms would fail in promoting rights. The granting of overriding normative status to international norms weakens the involvement of the state in delineating the scope of rights. This, in turn would alienate citizens and weaken their willingness and ability to exercise rights.

Arguably, however constitutions are as detached and alienated as international law is. After all constitutions are designed to limit and constrain the popular will. Hence, it is paradoxical to say that by giving priority to constitutional norms, one gives a voice to the people.

We do not deny that *relative to legislation* constitutional provisions may be alienating. If the contrast is between constitutions and legislation it is evident that legislation is less detached than constitutions and that individuals have greater control over it. Yet typically when the contrast is between constitutional law and international law, constitutional law is less detached and less alienating from international law as state constitutions are still a product of the polities. We turn in the next section to examine the normative implications of this view and defend the discordant parity hypothesis.

## IV. *THE CASE FOR DISCORDANT PARITY*

Part II and Part III give rise to a dilemma. On the one hand Part II argues for robust internationalism, namely it argues that international human rights should override constitutional norms as their superior normative power provides an institutional embodiment of the fact that rights are not merely discretionary; they are duties imposed on the state. On the other hand, Part III argues for robust constitutionalism, namely it argues that constitutional rights ought to override international provisions. The active participation of the state in determining the boundaries of rights and their weight is essential for the effective protection of rights by the polity as it facilitates engagement with rights and reinforces the willingness and readiness of citizens to exercise their rights. Consequently, the role of law in this context is a tricky one; it must, on the one hand, embody the

[35] Hans Kelsen, *Foundations of Democracy*, 66 ETHICS 1, 34 (1955).

understanding that the protection of rights is a matter of duty on the part of the state and, on the other hand, it must prompt citizens to exercise their rights. Somehow, the law must square the circle; it must contribute to the creation of high expectations for states, while leaving sufficient leeway so that states are free to become responsible in the true sense. A hands-off approach by the international community to questions of rights would erode the recognition that protecting rights is a duty of the state. Yet a tight, comprehensive set of global controls would remove from the states the discretion to make decisions and, consequently would weaken the capacity and willingness of citizens to exercise these rights.

One solution is of course to decide which concern is weightier. If the case for internationalism is weightier it follows that international norms ought to override state norms. If, on the other hand the case for constitutionalism is stronger, international norms ought to be overridden by state norms. In this Part we develop a different proposal and defend the model of discordant parity, namely a system under which international and constitutional norms have equal status. The parity we advocate is not based on harmony and cooperation between international or constitutional norms but on constant tensions frictions and conflicts. Before defending it, let us first establish that legal practice often presupposes hierarchy. Section B establishes that both state and international courts presuppose hierarchy and reject parity. As we argued in the introduction, the disagreement is not *whether* hierarchy is desirable but *which* hierarchy ought to guide courts. Section C defends discordant parity and examines its practical implications.

## A. Conflicting Assumptions of Hierarchy as Practiced by Courts

The view that there is a strict hierarchy between international and state norms can be found in legal decisions made by both state and international courts. Unsurprisingly state courts believe that state constitutions are superior to international norms while international tribunals defend the opposite view. Let us illustrate.

State courts in Europe refuse to give up on the national protection of their citizens' human rights as dictated by their own constitutions. For this reason, the unanimous conclusion of state courts is that in cases of direct conflict between international and state norms, the state norms prevail.[36]

A clear instance is the so-called Brunner case where the German Constitutional Court asserted that its role is to guarantee "this essential content [of the basic rights] as against the sovereign powers of the [European] Community as well," although it tried to mitigate the conflict by emphasizing that the German Court "exercises its jurisdiction on the applicability of secondary community legislation

[36] *See* Anne Peters, *Supremacy Lost: International Law Meets Domestic Constitutional Law*, 3 VIENNA ONLINE J. ON INT'L CONST. L. 170, 187 (2009); Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 Am. J. Int'l L. 241 (2008).

in Germany in a relationship of co-operation with the European Court."[37] Later on in the Lisbon case the German Court reiterated its commitment to the view that when powers are transferred to international organizations such powers:

> [A]re granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the principle of conferral and respecting the Member States' constitutional identity, and that at the same time the Member States do not lose their ability to politically and socially shape the living conditions on their own responsibility.[38]

Accordingly, the conclusion of the German Court in the Lisbon cases was that the legal order of the EU is a "derived fundamental order," whose "autonomy can only be understood as an autonomy to rule which is not independent but **. . .** is granted by other legal entities." By contrast, the sovereignty of the state "requires independence from an external will," And, therefore sovereignty should be described as "freedom that is organised by international law and committed to it."[39] The Czech Constitutional Court followed a similar route and argued that "for a nation-state just as for an individual within a society, practical freedom means being an actor, not an object."[40] These statements concerning the powers of state court are not grounded in technical considerations such as jurisdiction. Rather, the courts openly assert their responsibility as state organs who are guardians of their state constitution, the protectors of constitutional rights as against the potential intrusion on the part of the international order.[41]

A blatant statement to this effect was given by the Italian Constitutional Court. In justifying the primacy of state norms over international norms, the Italian Court argued that the transfer of powers to the international community is unauthorized when they result in:

> "[S]uppression or restriction of the fundamental rights granted to them [Italian citizens] by the Constitution, for these are guarantees that pertain

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[37] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 1 C.M.L.R. 57 (1994) (Ger.).

[38] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 2 BvE 2/08 (¶ 226).

[39] *Id.* at ¶ 223.

[40] Ústavnísoud Českérepubliky 26.11.2008 (ÚS) [Constitutional Court], 19/08, ¶ 107 (Quoting DAVID P. CALLEO, RETHINKING EUROPE'S FUTURE 141 (2001)); *See in general* Wojciech Sadurski, *"Solange, chapter 3": Constitutional Courts in Central Europe—Democracy—European Union*, 14 EUR. L. J. 1 (2008).

[41] Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] May 29, 1974, 2 C.M.L.R. 540 (1974) (The *Solange I* decision). *Solange* ('as long as') stands for the assertion by European constitutional courts resisting a surrender their authority to the European Court of Justice, and insisting on their role as guardians of their national constitutions. *See also* Joined Cases C-402/05 P and C-415/05 P, *Kadi& Al Barakaat Int'l Found. v. Council & Comm'n*, 2008 E.C.R. I-06351, *available at*http://curia.europa.eu/juris/celex.jsf?celex=62005CJ0402&lang1=en&type=TXT&ancre=.

> to disposed of, and most importantly cannot be left at the mercy of international institutions extraneous to the legal system of our country.'[42]

The Italian Court reiterated this position in another recent judgment, declaring as unconstitutional a law that would have barred the right of Italian citizens to sue Germany in Italian courts for crimes it committed during World War II.[43] The Court acknowledged that under international law, the individual "right to judicial protection of fundamental rights" is subject to the claim of foreign states to immunity. Nevertheless, the tension between these two conflicting interests must be resolved differently under the Italian constitution since:

> in an institutional context characterized by the centrality of human rights,…the denial of judicial protection of fundamental rights of the victims of the crimes at issue (now dating back in time), determines the completely disproportionate sacrifice of two supreme principles of the Constitution. They are indeed sacrificed in order to pursue the goal of not interfering with the exercise of the governmental powers of the State even when, as in the present case, state actions can be considered war crimes… Consequently, insofar as the [international] law of immunity from jurisdiction of States conflicts with the aforementioned fundamental principles [of the Constitution], it has not entered the Italian legal order and, therefore, does not have any effect therein.[44]

A similar view has also been endorsed in the US. Michael Paulson is a clear proponent of the supremacy of the US. Constitution:

> *For the United States the Constitution is supreme over international law.* International law, to the extent that it issues determinate commands or obligations in conflict with the US constitution is unconstitutional.[45]

Even US theorists who are sympathetic to international law and express the hope that one day it may override provisions of the US Constitution admit that as a matter of positive law US constitutional law overrides any conflicting international provisions. Thus, Peter Spiro advocates granting greater significance to international law but acknowledges that his proposal does not reflect the prevailing view. Spiro argues:

> Constitutional rights have presented a discursive bulwark against the encroachment of international law. The continuing refusal to contemplate the international determination of rights betrays the embedded nationalist orientation of constitutional theory…These nationalist assumptions may be conceptually vulnerable in the face of the changing architecture of

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[42] Guglielmo Verdirame, *A Normative Theory of Sovereignty Transfers*, 49 STAN. J. INT'L L. 371, 377–78 (2013) (Quoting Corte Cost. [Constitutional Court], 16 Dec., 1965, n. 98).

[43] Corte. Cost., 22 October 2014, n. 238 (It.), *unofficial translation available at* http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf (regarding the constitutionality of Article 1 of Law No. 848).

[44] *Id.*, at p. 15.

[45] Michael Stokes Paulsen, The Constitutional Power to Interpret International Law 118 Yale L.J. 1762, 1765 (2009).

> international law and community…Accompanying doctrines of constitutional hegemony, deviations notwithstanding, were justified in a world in which law offered no protection of individual rights. As the regime of international human rights grows thick however that justification should no longer stand unchallenged.[46]

It is hardly surprising that international tribunals reject the primacy of state courts and believe in the primacy of international norms. The International Court of Justice had little trouble rejecting the position of the Italian courts "in denying Germany the immunity to which the Court has held it was entitled under customary international law [as] a breach of the obligations owed by the Italian State to Germany."[47] Similarly, the European Court of Justice believes in "the idea of absolute supremacy according to which Community law trumps even the core of member states' constitution."[48] Numerous cases insist on the superiority of European community law over the provisions of state constitutional law.[49] The position of the regional human rights courts (European and Inter-American) is equally unambiguous.[50] The International Criminal Tribunal for the Former Yugoslavia (ICTY) asserted its exclusive role in prosecuting war crimes while preempting state courts due to the fact that major violations of human rights that amount to crimes against humanity are "universal in nature … and transcending the interest of any one State. [I]n such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world."[51]In concluding her detailed survey of this conflict from the perspective of international law, Dinah Shelton wrote what seems to be a prevailing view among international lawyers. Shelton wrote:

> The extent to which the system has moved and may still move, towards the imposition of global public policy on nonconsenting states remains highly debated, but the need for limits on states' freedom of action seems to be

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[46] Peter J. Spiro, Treatises, International Law and Constitutional Rights 55 Stanford L. Rev. 1999, 2028 (2003).

[47] The International Court of Justice in Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening) (Merits) [2012] ICJ Rep 99, para. 107.

[48] Fernando Castillo de la Torre, *Tribunal Constitucional (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty Establishing a Constitution for Europe*, 42 COMMON MKT. L. REV. 1169 (2005) (Quoting Declaración T.C. [Constitutional Court], Dec. 13, 2004 (Spain)).

[49] *See, e.g.*, Case 11/70, *Internationale Handelsgesellschaft mbh v. Einfuhr*, 1970 E.C.R. 1125; Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585. For a general account of the European courts and their attitudes towards fundamental rights, see Lorenzo Zucca, Monism and Fundamental Rights in *Philosophical Foundations of European Union Law* chap. 13 (eds. Julie Dickson & Pavlos Elefheriadis, 2012).

[50] *See, e.g.*, Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GER. L. J. 1203 (2011). For examples see "Mapiripán Massacre" v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 243 (Sep. 15, 2005); Atala Riffo and Daughters v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 79 (Feb. 24, 2012).

[51] Prosecutor v Tadic (Jurisdiction), Appeals Chamber, 2 October 1995, (1997) at para. 42 (available at http://www.icty.org/x/cases/tadic/tdec/en/100895.htm)

> increasingly recognized. …Perhaps the most significant positive aspect of this trend towards normative hierarchy is its reaffirmation of the link between law and ethics, in which law is one means to achieve the fundamental values of an international society.[52] (references omitted)

Given the persistence of the conflicts between international and constitutional law there have been many proposals to mitigate the tensions between the two systems and reduce the dissonance between constitutional rights and international human rights by mutual accommodation of the two systems.[53] Some theorists have defended a parity paradigm which is based on harmonious interdependence between international and constitutional law.[54] This sentiment led courts to develop a variety of mechanisms designed to reduce the conflicts between constitutional rights and international human rights. Some of these methods involve accommodations by the international human rights to national constitutional rights; others involve accommodation by a national legal system to the international legal system.

The first type of mechanisms designed to reduce the conflict consist of international law doctrines which aim to accommodate the demands of constitutional rights. Such mechanisms include for instance interpretative methods that are used by international tribunals that take into account the prevailing doctrines of national constitutions.[55] Saving clauses which protect explicitly the prevailing power of certain provisions in national constitutions are also used extensively.[56] Another well-settled doctrine of European law is the doctrine of "margin of appreciation" developed by the European Court for Human Rights to mediate between the demands of the European Convention on Human Rights and the domestic norms of the member states. According to the Court, "the Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals."[57]

The second type of mechanisms of mechanisms designed to reduce the conflict consist of constitutional law doctrines which aim to accommodate the demands of international human rights. Some constitutions include provisions which give

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[52] Dinah Shelton, Normative Hierarchy in International Law 100 American Journal of International Law 291, 323 (2006).

[53] Gerald L. Neumann, Human Rights and Constitutional Rights: Harmony and Dissonance 55 Stanford L. Rev. 1863 (2003); Mattias Kumm, The Legitimacy of International Law: A Constitutional Frame of Analysis 15 European Journal of International law 907 (2004).

[54] For example Mattias Kumm argued: "The relationship between domestic and international law is neither one of derivation nor of autonomy, but of mutual dependence. National and international law are mutually co-constitutive. The constitutional legitimacy of national law depends, in part, on being adequately integrated into an appropriately structured international legal system. And the legitimacy of the international legal system depends, in part, on states having an adequate constitutional structure. The standards of constitutional legitimacy are to be derived from an integrative conception of public law that spans the national-international divide." See Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law*, 20 IND. J. GLOBAL LEGAL STUD. 605, 612 (2013).

[55] See Neumann, supra note 100 at 1895-99.

[56] Neumann, supra note 100 at 1886-87.

[57] Lautsi v. Italy, App. No. 30814/06, 2011 Eur. Ct. H.R..

constitutional status to human rights treaties.[58] Other national constitutions guide judges to interpret the constitution in ways that do not conflict with international human rights law.[59] Even in the American context which, as a general rule is quite hostile to international influences, some theorists expressed the conviction that "international law is our law" and showed that the American courts gave greater role to international law than is generally perceived. This was done by using various means including for instance by endorsing international standards in interpreting provisions of the US Constitution.[60]Most scholars regard this head-on clash between constitutional and international law with concern. Many are critical and seek to offer theses why national courts are right and international courts are wrong, or vice versa.[61] We are less concerned. We actually regard this tension as useful for emphasizing the primacy of human rights and for bolstering freedom. The next section rejects the assumption of hierarchy and defends the parity paradigm.

### B. The Case for Discordant Parity

This section argues that both international and state courts have it right *and* wrong.[62]The discordant parity paradigm rejects both internationalism (advocated by international tribunals) and constitutionalism (advocated by state courts). Under the discordant parity paradigm, a system that seeks to respect and ensure

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[58] For a comparative survey, see Thomas Buergenthal, Modern Constitutions and Human Rights Treaties 36 Columbia Journal of Transnational Law 211 (1998); Vladlen S. Vereshchetin, New Constitutions and the Old Problem of the Relationship Between International Law and National Law 7 European Journal of International Law 29 (1996). For an empirical analysis, see Tom Ginsburg et al, Commitment and Diffusion: How and Why National Constitutions Incorporate International Law 2008 University of Illinois L. Rev. 201 (2008).

[59] For a detailed discussion of these mechanisms, see Neumann, supra note 100 at 1895-99. For a discussion in the US context, see Gerald L. Neumann, The Uses of International Law in Constitutional Interpretation 98 American Journal of International Law 82 (2004). For a warning against the uses of international law in domestic law, see Roger P. Alford, Misusing International Law to Interpret the Constitution 98 American Journal of International Law 57 (2004). For a discussion of Canadian law, see The Hon Michael Kirby A CMG, Constitutional Law and International Law: National Exceptionalism and the Democratic Deficit 12 U. Notre Dame Austl L. Rev. 95, 102-104 (2010). For a discussion of the European context, see Gerrit Betlem and Andre Nollkaemper, Giving Effect to Public International Law and European Community Law before Domestic Courts 14 European Journal of International Law 569 (2003).

[60] Harold Hongju Koh, International Law is Our Law 98 American Journal of International Law 43 (2004).

[61] For the thesis that international courts are right see recently ANDRE NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW (2011). For the opposite view see ERIC POSNER AND JACK GOLDSMITH, THE LIMITS OF INTERNATIONAL LAW (2005).

[62] In analyzing this tension, it may be useful to point out that in practical terms, it was this inherent tension between the two normative sources of law which proved an effective ratcheting-up mechanism for promoting individual liberties. The state courts in Europe that insisted on the primacy of their state constitutions prompted a debate in the international sphere that led to a considerable improvement in the level of protection of individual rights; at the same time, criticisms voiced by international courts and other organs have led to reforms in state protection of individuals.Eyal Benvenisti & George Downs, *Democratizing Courts: How National and International Courts Promote Democracy in an Era of Global Governance*, 46 NYU J. INT'L L & POL. 741 (2014). See also Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 74-75 (2003).

human rights must not be based on a rigid hierarchy but instead on two distinct foundations, one derived from a global concern for individual rights aimed at conveying publicly the mandatory non-discretionary force of human rights and the other derived from the concern of the political community of which one is a member to participate in determining the scope of rights and their weight.

Under a scheme of discordant parity, international and state norms and courts constantly compete with each other and assert their superiority over each other. Discordant parity gives expression both to the demand to publicly convey the fact that human rights are mandatory rather than discretionary, namely that the state has a duty to protect them and to the wish to facilitate the effective exercise of rights. The co-existence of the two layers is justified not (only or primarily) by its instrumental contribution to the protection of rights but also by the fact that the protection of rights is neither at the mercy of national constitutional courts nor detached or alienated from the local communities. Like Escher's drawing, the two systems can be side by side, each controlling the other.

The discordant parity paradigm developed here highlights the fact that delineating the scope of human rights is a deliberative enterprise based on competing ideals. Because of the parity, each norm-interpreter, be it either an international law or a domestic law interpreter, must give due account to the interpretation adopted by its national and international peers. The conflict between international and state norms respects human agency and therefore need not be resolved but in fact celebrated and even intensified. But at the same time, because interpreters must accept the relevancy and pertinence of the equivalent norms of the parallel and complementary body of law, they must consult the parallel sources with the view to accommodate them unless serious considerations suggest otherwise.

Discordant parity should provide a guide for constitutional framers and for international lawyers. It suggests for example that it is wrong to strive for global constitutionalism or a global rule of law based on hierarchy, or endorse a constitutional provision (as the Netherlands has done) under which every requirement of international law becomes automatically part of the law of the state. It is also wrong to assume that state institutions can operate at the same time also as agents of the international system – what George Scelle termed in the 1930s "*dedoublement fonctionnel*" (dual functionality).[63] Instead, to guarantee discordant parity, the state ought to seek to accommodate – but not to defer to -- the international order. Every state must assert its convictions and express its judgments even when they conflict with international law. Similarly, international tribunals ought also to maintain a degree of independence from the national courts.

[63] *See* SCELLE supra note 13.

Although as we showed above international and national tribunals insist on supremacy or alternatively aim to mitigate or eliminate the tensions between their international and constitutional provisions, some courts seem to acknowledge the inevitable existence of such tensions. The European Court for instance acknowledged that in the sphere of education it "must … take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development." But at the same time it rejected simple deference, when it "emphasise[d] that the reference to a tradition cannot relieve a Contracting State of its obligation to respect the rights and freedoms enshrined in the Convention and its Protocols."[64] Similarly, with respect to France's ban on the burqa and niqab, the European Court stated that "It is also important to emphasize the fundamentally subsidiary role of the Convention mechanism. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight."[65]

Our analysis implies that the efforts to critique such doctrines as inherently unclear and imprecise fail, and, in fact, the efforts to clarify, specify and disambiguate those doctrines are inherently misguided. Clarity is the enemy of discordant parity. The pursuit of "hierarchy," "harmony" and "order" between the international and the constitutional is fundamentally at odds with the idea that individual freedom is founded on friction and discordance.[66] Hence it is important to acknowledge the justifiability of violation of international principles when international principles conflict with "countervailing normative principles relating to jurisdiction, procedure or outcomes."[67]

The inherent conflicts characterizing human rights law are positive and even necessary for sustaining of human rights discourse. Further such conflicts consist not only in a conflict over what human rights are but also who the author of those rights is and consequently which institutions – international or constitutional – have authority to define their scope and determine their weight. The conflict between international and state norms need not be resolved; in fact it needs to be maintained and intensified. This conflict is a permanent and desirable feature of the legal world. Ironically, it is the resolution of the conflict which may undermine the legitimacy of the constitutional and international order.

## V. *CONCLUSION*

[64] Latusi v. Italy, App. No. 30814/06, 2011 Eur. Ct. H.R. para. 68.
[65] *S.A.S. v. France* App. No. 43835/11, 2014 Eur. Ct. H.R..
[66] This view conflicts with some of the traditional discussions of the rule of law and its importance to freedom. See Joseph Raz, The Rule of Law and Its Virtue in Joseph Raz, The Authority of Law chap. 11 (1979).
[67] Kumm, supra note 100 at 928.

Discordant parity is founded on the conviction that the role of law in forming the social context within which states honor rights is a tricky one. Somehow the law must contribute to the creation of challenging demands from the state, while leaving also sufficient leeway so that states are free to become responsible for determining the content of rights. A hands-off approach by the law to questions of rights would abdicate any global responsibility for norms of justice; yet a tight, comprehensive supervision would remove from states the discretion to act and consequently undermine the willingness and the readiness to exercise rights.

Internationalism is the institutional embodiment of the vision that states are bound by rights. The protection of rights is obligatory rather than discretionary and their mandatory force needs to be publicly acknowledged. The state need not only protect rights; it also needs to do it in a way that underscores the fact that it is obliged to do so. Internationalism provides the institutional tool to enable the state to do so. On the other hand, constitutionalism is also essential as the value of rights hinges on the exercise of rights and in order to facilitate and reinforce the exercise of rights, it is necessary that the polity participates actively in dictating what these rights are. If citizens are alienated from the process of determining what the rights are and what their weight is, they are less likely to actively exercise the rights. The solution – discordant parity -- challenges the tradition that is based on a strict hierarchy between international law and state law. Such parity implies constant tensions and conflicts between the international norms and state norms. This conflict is a permanent and desirable feature of the legal world. Ironically it is the urge to resolve this conflict – the urge to realize orderly harmony that ultimately may undermine the legitimacy of the constitutional and international order.